



1 claiming federal question jurisdiction arising under the  
2 provisions of Part C of the Medicare Act, 42 U.S.C. § 1395w-21 et  
3 seq.

4 Defendants move the Court to compel Plaintiffs to submit all  
5 causes of action to binding arbitration pursuant to an arbitration  
6 agreement Mrs. Drissi purportedly signed when she enrolled in the  
7 Health Plan. Plaintiffs assert that the arbitration agreement is  
8 unenforceable because it violates California Health & Safety Code  
9 section 1363.1, which imposes certain standards on health care  
10 service plans that require binding arbitration. Defendants  
11 maintain that the California law is inapplicable because it is  
12 preempted by the Medicare Act.

13 This Order follows quickly on the Court's recent Order  
14 Granting Defendants' Motion to Compel Arbitration in the related  
15 case, Clay v. Permanente Medical Group, Inc., No. 06-7926. See  
16 Docket No. 15 ("Clay Order"). The facts and legal issues are  
17 largely similar, as is the Court's conclusion. The Court issues  
18 this Order separately to address minor, but relevant, factual  
19 differences.

20 The parties have fully briefed the issues, and counsel for  
21 both parties participated in oral argument before the Court in the  
22 Clay matter. Having considered all of the submissions and  
23 arguments, the Court hereby GRANTS Defendants' Motion to Compel  
24 Arbitration.

25

26 **II. BACKGROUND**

27 Colleen Drissi enrolled in the Health Plan under a group  
28

1 agreement between Health Plan and her employer, San Juan Unified  
2 School District. Dean Decl. ¶ 2. Mrs. Drissi was a Health Plan  
3 member from the time she enrolled, in October 1990, until her  
4 death in January 2005.

5 Mrs. Drissi suffered kidney problems and, in 2000, she was  
6 placed on the waiting list for a kidney transplant. At that time,  
7 Defendants did not operate their own kidney transplant program, so  
8 Defendants paid for Mrs. Drissi to receive medical care through  
9 the kidney transplant program at U.C. Davis.

10 The Health Plan Senior Advantage is a program under which the  
11 Health Plan provides Medicare services to plan members, pursuant  
12 to an agreement with the Centers for Medicare & Medicaid Services  
13 ("CMS"). In 2003, Mrs. Drissi enrolled in the Health Plan Senior  
14 Advantage program. According to Jason Hall, Health Plan's  
15 Director of Medicare Compliance, when a Health Plan member  
16 requests information regarding the Senior Advantage program,  
17 Health Plan sends the member an enrollment kit containing the  
18 Election Form and a copy of the Evidence of Coverage ("EOC"). The  
19 Election Form Mrs. Drissi signed included a notice, in bold text  
20 surrounded by a box and highlighted with a different background  
21 color from the rest of the page, stating, "Please read the  
22 Conditions of Election and Authorization to Exchange Information  
23 on the back of this form. Sign and date below." Dean Decl. Ex.  
24 D. Beneath that box, the following text appeared:

25 I understand that, except for Small Claims Court cases  
26 and claims subject to a Medicare appeals procedure, any  
27 dispute between myself, my heirs, or other associated  
parties on the one hand and Health Plan, its health care  
provides, or other associated parties on the other hand,

1 for alleged violation of any duty arising out of or  
2 related to membership in Health plan, including any  
3 claim for medical or hospital malpractice, for premises  
4 liability, or relating to the coverage for, or delivery  
5 of services or items, irrespective of legal theory, must  
6 be decided by binding arbitration under California law  
and not by lawsuit or resort to court process, except as  
applicable law provides for judicial review of  
arbitration proceedings. I agree to give up my right to  
a jury trial and accept the use of binding arbitration.  
I understand that the arbitration provision is contained  
in the Evidence of Coverage.  
7

8 Id. On the back of the Election Form the following paragraph  
9 appeared under the bold heading "Conditions of Election":

10 If you are electing Kaiser Permanente Senior Advantage  
11 Coverage, be certain that you fully understand the  
12 arbitration provision, benefits, limitations, and  
13 conditions, which are described in the Kaiser Permanente  
14 Senior Advantage Group Disclosure Form and Evidence of  
15 Coverage or the Individual Membership Agreement and  
Disclosure Form and Evidence of Coverage. The above  
documents may be found in the enrollment kit, and it is  
available through your group benefits administrator, or  
made available by calling the Kaiser Permanente Member  
Service Call Center. . . ."

16 Id. Ex. E. The Health Plan amended the EOC annually, and sent  
17 each member a summary of the amendments, as well as the final  
18 amended EOC approved by the CMS.

19 In June 2004, Defendants informed Mrs. Drissi that they were  
20 opening their own kidney transplant program in San Francisco, and  
21 would therefore no longer cover the cost of her care at U.C. Davis  
22 or U.C. San Francisco. At the time, Mrs. Drissi was supposedly  
23 near the top of the waiting list for a new kidney in the U.C.S.F.  
24 program. In September 2004, Mrs. Drissi transferred to the Kaiser  
25 transplant program. A few months later, without undergoing a  
26 transplant, Mrs. Drissi died from complications arising out of her  
27 kidney problems.

1           During the second half of 2004 and beginning of 2005, when  
2 Mrs. Drissi was transferred to Kaiser's kidney transplant program,  
3 the then-current EOC contained the following provisions for  
4 binding arbitration:

5           For all claims subject to this "Binding Arbitration"  
6 section, both Claimants and Respondents give up the  
7 right to a jury or court trial, and accept the use of  
8 binding arbitration. Insofar as this "Binding  
9 Arbitration" section applies to claims asserted by  
Kaiser Permanent Parties, it shall apply retroactively  
to all unresolved claims that accrued before the  
effective date of this EOC. Such retroactive  
application shall be binding only on the Kaiser  
Permanente Parties.

10           Scope of Arbitration

11           Any dispute shall be submitted to binding arbitration if  
12 all of the following requirements are met:

- 13           1. The claim arises from or is related to an alleged  
14 violation of any duty incident to or arising out of  
15 or relating to this EOC or a Member Party's  
16 Relationship to Kaiser Permanente Health Plan, Inc.  
(Health Plan), including any claim for medical or  
hospital malpractice, for premises liability, or  
relating to the coverage for, or delivery of,  
Services, irrespective of the legal theories upon  
which the claim is asserted.
- 17           2. The claim is asserted by one or more Member Parties  
18 against one or more Kaiser Permanente Parties or by  
19 one or more Kaiser Permanente Parties against one  
or more Member Parties.

20           Hall Decl. Ex. C.

21           Plaintiffs filed this suit alleging wrongful death,  
22 concealment, and conspiracy. Defendants asked if Plaintiffs would  
23 submit the matter to binding arbitration. Plaintiffs refused, and  
24 Defendants brought this motion.

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26           **III. PREEMPTION ANALYSIS**

27           Section 2 of the Federal Arbitration Act ("FAA") provides

1 that "a contract evidencing a transaction involving commerce to  
2 settle by arbitration a controversy thereafter arising out of such  
3 contract or transaction . . . shall be valid, irrevocable, and  
4 enforceable, save upon such grounds as exist at law or in equity  
5 for the revocation of any contract." 9 U.S.C. § 2. Rather than  
6 belabor the point, the Court adopts its reasoning from Clay, and  
7 holds that the FAA is applicable here. See Clay Order at 5-6.

8 Plaintiffs assert that the arbitration agreement violates  
9 California Health & Safety Code section 1363.1, and is therefore  
10 unenforceable. See Malek v. Blue Cross of Cal., 121 Cal. App. 4th  
11 44, 64 (Ct. App. 2004). Defendants respond that application of  
12 section 1363.1 is preempted by the Medicare Act.

13 "[W]hen Congress has 'unmistakably. . . ordained,' that its  
14 enactments alone are to regulate a part of commerce, state laws  
15 regulating that aspect of commerce must fall." Jones v. Rath  
16 Packing Co., 430 U.S. 519, 525 (1977) (quoting Fla. Lime & Avocado  
17 Growers, Inc. v. Paul, 373 U.S. 132, 142 (1963)). Here, Congress  
18 has unmistakably ordained that Medicare preempts all state  
19 regulation:

20 Relation to State laws. The standards established under  
21 this part shall supersede any State law or regulation  
(other than State licensing laws or State laws relating  
22 to plan solvency) with respect to MA plans which are  
offered by MA organizations under this part.

23 42 U.S.C. § 1395w-26(b)(3). The standards established under this  
24 statute govern the approval and distribution of marketing  
25 materials, such as the EOC. See, e.g., 42 C.F.R. §§ 422.80,  
26 422.111. Specifically, 42 C.F.R. § 422.80(c) provides the  
27 guidelines for CMS review of Medicare Advantage marketing

1 materials. The CMS review process checks to make sure that the  
2 disclosure is printed in a proper format and text size. Id. §  
3 422.80(c)(1). The CMS also reviews the marketing materials to  
4 determine whether they include an "[a]dequate written explanation  
5 of the grievance and appeals process, including differences  
6 between the two, and when it is appropriate to use each." Id. §  
7 422.80(c)(1)(iii).

8 As California Health & Safety Code section 1363.1 purports to  
9 regulate the adequacy of disclosures regarding arbitration  
10 agreements imposed by health plans, the foregoing federal  
11 regulations preempt its application to Medicare marketing  
12 materials.<sup>1</sup> The Court therefore cannot apply section 1363.1 to  
13 invalidate the arbitration provision of the EOC governing the  
14 relationship between Mrs. Drissi and Defendants.

15

16 **IV. APPLICABILITY OF THE EOC TO NON-SIGNATORY PLAINTIFFS**

17 Plaintiffs argue that because they did not agree to the  
18 arbitration agreement, they cannot be bound by it, even if it  
19 would have bound Mrs. Drissi. On this issue, Defendants rely on  
20 Herbert v. Superior Court of Los Angeles County, 169 Cal. App. 3d  
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22 <sup>1</sup>A more detailed analysis of preemption, including discussion  
23 of the congressional purpose in amending the Medicare preemption  
24 provision, is set forth in the Clay Order at pages 7-15. That  
25 reasoning is equally applicable here, and the Court therefore  
26 adopts it. The only difference on this issue here is that the Clay  
27 decedent had signed his enrollment form for the Health Care Senior  
Advantage in 2000, and the Clay plaintiffs argued that under the  
then-applicable standards, section 1363.1 was not preempted. As  
Mrs. Drissi did not enroll in the Health Plan Senior Advantage  
until 2003, there is no need to consider the pre-2000 version of  
the statute.

1 718 (Ct. App. 1985), and its progeny. In Herbert, the court held  
2 that the non-signatory plaintiffs had to submit their wrongful  
3 death claims to arbitration. Id. at 725. Plaintiffs identify a  
4 split in the California authority, directing the Court to Rhodes  
5 v. California Hospital Medical Center, 76 Cal. App. 3d 606 (Ct.  
6 App. 1978), and subsequent decisions following it. As in Clay,  
7 the Court finds the Herbert authority more persuasive.<sup>2</sup>

8 One factual difference between Clay and the present matter  
9 warrants discussion, however. In Clay, the deceased and his  
10 spouse were both members of the same health plan. Clay Order at  
11 18-19. This was relevant because previous California decisions  
12 suggested that the authority to secure health care for one's  
13 spouse implies the authority to require the spouse to arbitrate  
14 claims arising out of that health care. See id. (citing Herbert,  
15 169 Cal. App. 3d at 723; Hawkins v. Super. Ct., 89 Cal. App. 3d  
16 413, 418-19 (Ct. App. 1979)). Here, there is no evidence that Mr.  
17 Drissi is a member of the Health Plan, so it is less clear that  
18 Mrs. Drissi could bind Mr. Drissi to the arbitration agreement.

19 None of the authority cited by the parties addresses this  
20 distinction. Plaintiffs' cases are distinguishable here for the  
21 same reasons they were in Clay. The arbitration agreement in  
22 Rhodes lacked a provision purporting to bind the decedent's heirs  
23 to the arbitration agreement. 76 Cal. App. 3d at 608-09. Also  
24 unlike the present case, the Rhodes plaintiffs did not include the  
25 decedent's estate. Id. at 609. The same distinctions apply to

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26  
27 <sup>2</sup>Again, a complete analysis comparing Herbert and Rhodes  
appears in the Clay Order, which the Court adopts here as well.

1        Baker v. Birnbaum, 202 Cal. App. 2d 288, 290-92 (Ct. App. 1988).  
2        Finally, in Buckner v. Tamarin, 98 Cal. App. 4th 140 (Ct. App.  
3        2002), neither the decedent's estate nor the decedent's spouse was  
4        a plaintiff. Id. at 141-43.

5            Of the cases reviewed by the Court, Herbert is the most  
6        applicable. The Court must determine, however, if the fact that  
7        Mr. and Mrs. Drissi were not members of the same health plan is  
8        relevant. The Hawkins decision, on which Herbert relied, noted  
9        that, "[s]pouses have mutual obligations to care for and support  
10      the other . . . , including the obligation to provide medical care  
11      . . . , and they occupy a fiduciary relationship to each other."  
12      89 Cal. App. 3d at 418-19 (internal citations omitted). The  
13      support obligations have a statutory origin. See id. (citing Cal.  
14      Civ. Code § 242 (repealed and replaced by Cal. Fam. Code § 4300)).  
15      The Hawkins court concluded that these obligations give one spouse  
16      the power to contract for medical care on behalf of the other.  
17      Id. at 419. The court recognized that in similar situations,  
18      where one party has the power to contract for medical care on  
19      another's behalf, he or she may also agree on the other's behalf  
20      to arbitrate. Id. (citing Madden v. Kaiser Found. Hosps., 17 Cal.  
21      3d 699 (1976)(parent can bind child to arbitration when securing  
22      care for child); Doyle v. Giuliucci, 62 Cal. 2d 606 (1965)(state  
23      can bind employees to arbitration when negotiating group health  
24      care on their behalf)).

25            In both Herbert and Hawkins, the decedent and his or her  
26      spouse were enrolled in the same medical plan. See Herbert, 169  
27      Cal. App. 3d at 723-24; Hawkins, 89 Cal. App. 3d at 418-19.

1 However, the decedent's authority to bind the spouse to arbitrate  
2 was based upon the authority to provide for medical care, not the  
3 actual provision of care. That is, it appears that the fiduciary  
4 duties and obligations of spouses to provide medical care for one  
5 another are sufficient basis for binding one another to  
6 arbitration agreements. Thus, Mrs. Drissi's agreement that her  
7 heirs would arbitrate claims arising from her membership in the  
8 Health Plan Senior Advantage binds Mr. Drissi. Because both Mrs.  
9 Drissi's estate and Mr. Drissi are bound to arbitrate, the  
10 remaining Plaintiffs must also arbitrate their claims for wrongful  
11 death. See Herbert, 169 Cal. App. 3d at 725-26 (describing the  
12 policy underlying the "one-action rule" for wrongful death suits).

14 || V. CONCLUSION

15 For the reasons set forth above, the Court GRANTS Defendants' Motion to Compel Arbitration and ORDERS as follows:

16



22 || IT IS SO ORDERED.

24 || January 3, 2008

Samuel J. Tamm